## RECENT AMERICAN DECISIONS.

### *In the Circuit Court of the United States, July* 1859.

BILSON *vs.* THE MANUFACTURERS' INSURANCE COMPANY.[1]

1. A mortgagor effects a policy of insurance against fire, which provides that the insurers' liability should cease upon assignment of the *policy* without their consent: and that it should become void in case of the termination of the interest of the insured in the subject of the insurance. Subsequently the mortgagor makes an assignment of *all his title and interest* in the policy to the mortgagee—in *visual juxtaposition* to the policy, though without the written consent of the insurers, and a renewal is effected and premium therefor paid by the mortgagee. Mortgagor then conveys the fee to the mortgagee.

   *Held*, That the Court properly instructed the jury that if the existence of the assignment was known to the assurers, the act of renewal included the consent required by the policy.

   *Held*, however, furthermore, that the assignment to the mortgagee only operated as an equitable transfer of the policy, and that the approval of the assignment by the insurers did not convert his contract into a *new* one for the independent insurance of the mortgagee.

2. The transfer of the property to the mortgagee, so as to divest the mortgagor's (the plaintiff's) interest, has the same effect as if the conveyance had been made to some third person other than the mortgagee, there being, in both cases, a change of interest in the subject of the insurance. *Grosvenor* vs. *The Atlantic Mut. Ins. Co.*, 3 Smith, 391, and *The State Mut. Ins. Co.* vs. *Roberts*, 7 Casey, 440; 7 Am. Law Reg., 229, approved.

The opinion of the court was delivered by

CADWALADER, J.—The defendants insured the plaintiff in $1500, against loss by fire, on a building in Baltimore, for one year from the 14th of March, 1856. The policy provided that the defendants' liability should cease in case of a total or partial assignment of the policy, without their consent in writing endorsed upon it; and also declared that the policy should become void in case of any transfer, or termination of the interest of the insured, (meaning interest in the building, or subject of insurance,) either by sale or otherwise. It contained a provision that the risk not being changed, the insurance might be continued for such further time as might be agreed upon; the premium for the renewal being paid, and its payment endorsed, or a receipt for it given.

[1] We are indebted to the Legal Intelligencer for this case.—*Eds. Am. Law Reg.*

The plaintiff, on the 12th of September, 1856, subscribed, on the back of the policy, an assignment of all his title and interest in it, to William Conine. This party's interest was under a mortgage of the premises insured, executed by the plaintiff, to secure the payment of a debt greater in amount than the sum insured. This assignment was made by filling up, in a fair hand, and subscribing, a blank form, printed in large type. Conine and the plaintiff resided in Baltimore, where the defendants had a resident agent; through whom the abovementioned insurance, and the renewal mentioned below, were effected.

On the 14th March, 1857, the defendants renewed the insurance for another year. Their agent's receipt for the premium for this renewal was endorsed upon the policy directly under the abovementioned assignment. This assignment was in such visual juxtaposition, that the agent could not have failed to see the whole of it, when he subscribed the receipt, without an extraordinary want of attention to what was before him for inspection. It was proved that Conine had paid this premium for the renewal of the insurance; and there seemed to be no reason to doubt that he was the person for whose benefit the insurance was intended by the parties in Baltimore to continue in force.

After this renewal, the plaintiff, by a deed, of which the existence was not made known to the defendants, for a pecuniary consideration, in addition to the mortgage debt, conveyed the equity of redemption of the premises insured to the mortgagee, Conine, absolutely in fee.

After the plaintiff's interest had been thus entirely divested, the building was, before the end of the second year, consumed by fire. The loss thus incurred was of an amount greater than the sum insured.

The defendants, at the trial, objected to the plaintiff's recovery, on the ground that his assignment of the policy to Conine, having been made without the written consent required by the policy, had annulled the insurance. On this point the court instructed the jury that the evidence would justify them in finding that the defendants' agent, when he renewed the insurance, was aware of the existence

and contents of the assignment, which was then, in effect, exhibited to him; adding, that if the jury should so find, the act of renewal included, sufficiently, the consent required by the policy.

The jury found a verdict for the plaintiff. The court is of opinion that, upon the point on which the instruction was given, the verdict was right, and that the instruction, as to this point, was not erroneous. But the court is also of opinion that this is not the point on which the decision of the case properly depends. The question of interest in the insurance, as distinguished from that of interest in the subject of insurance, was alone considered at the trial. The difficulty in sustaining the verdict arises from the fact that the conveyance of the equity of redemption, by the plaintiff to Conine, changed entirely the interest on the subject of insurance. As the previous mortgage debt had, in amount, exceeded the sum insured, Conine's acceptance of this conveyance might, possibly, not have modified, substantially, his interest in the insurance, as it would have been retained by him if the defendants had approved of the conveyance. But, be this as it may, the conveyance converted his interest in the subject of insurance, from that of a mere security for a debt, into an absolute exclusive ownership; and at the same time, determined entirely the plaintiff's interest in the subject. Though attention may not have been particularly directed at the the trial to the effect of this change of interest, the defendants, if it entirely discharged them from liability, ought not to be deprived of the benefit of it on a motion for a new trial.

Another point which has been taken, on behalf of the defendants, is, that though an action of assumpsit, at the suit of Conine, had been sustainable, upon the act of renewal, as a contract with him, the present action of assumpsit by the party originally insured, who, on the renewal, was neither the promisee nor the party to whom the loss was to be paid, cannot be sustained.

If the decision in *Tillou* vs. *The Kingston Mutual Insurance Company*, 1 Selden, 405, were law, there could, upon the facts of the present case, have been a recovery in an action at the suit of Conine. That case was adjudged by the Court of Appeals of New York, in 1851. Three partners, owning a mill, in which they con-

ducted their joint business, held a policy of insurance on it against fire, which, like the policy now in question, contained a provision that it should become void if the property insured was alienated by sale, or otherwise. The policy was assigned by the parties insured, with the assent of the insurers, to secure a mortgage on the mill for a debt of less amount than the sum insured. One of the partners insured, on afterwards retiring from the business, conveyed his interest in the mill to the other two owners. It was destroyed, subsequently, by fire. Two points were decided; the first, that this conveyance, by one partner to the others, had, except as to the mortgage, annulled the insurance; the second, that the mortgagee was, nevertheless, to the amount of the mortgage debt, entitled to the benefit of the insurance.

The decision of the first point, that, where partners are insured, an assignment by one of them to the others, annuls the contract of insurance as between them and the insurer, has been questioned in a subsequent extrajudicial dictum of the same court, 3 Smith, 412. But, the decision, on this point, has been followed in a direct adjudication, by the Supreme Court of Pennsylvania, in the recent case of *The Lycoming County Mutual Insurance Company* vs. *Finley*. In this case, the court said, "that a sale by one partner to the other, is within the prohibition, cannot be doubted. There is no exception in its favor in the instrument; and the terms used give no reason to imply any." These terms were the same as in the New York case. The partner who, without the consent of the insurer, conveys his interest in the subject of insurance to his copartners, gives them, from thenceforth, an exclusive dominion and control where he had, previously, the right of participating in any control or dominion that could have been exercised. He thereby ceases to be a protector of the property insured against fire from fraud, or from any other cause for which the personal identity of a party insured can be material to an insurer. The decision on this point, therefore, appears to have been founded in sound legal reason.

On the second point, the decision was founded on the assumed reason that the approval, by the insurers, of the assignment of the policy to the mortgagee, had constituted a distinct and independent

contract by them, with him, entitling him to the benefit of the insurance, in such a manner that his interest was not liable to be affected by subsequent acts or omissions of the party originally insured. On this point, the decision has been overruled by the Court of Appeals of New York in the recent cases of *Grosvenor* vs. *The Atlantic Mutual Insurance Company*, and *The Buffalo Steam Engine Works* vs. *The Sun Mutual Insurance Company*, 3 Smith, 391, 401, 414. As the law of New York is now settled, the assignment of a policy of insurance against fire to a mortgagee, with the assent of the insurer, merely gives to the mortgagee the right of requiring that the amount insured shall, to the extent of the mortgaged debt, be paid to him, whenever it would afterwards have been recoverable by the mortgagor, if no such assignment had been made. The approval of the assignment by the insurer does not convert his former contract of insurance into a new one for the independent insurance of the mortgagee. Unless the mortgagor could have recovered, if no assignment had been made, there can be no recovery of the insurance by or for the mortgagee. Therefore, a subsequent alienation of the equity of redemption by the mortgagor, made before any loss by fire without the consent or approval of the insurer, annuls the insurance as to both mortgagor and mortgagee.

The cases reported in 7 Casey, 430; 8 Cushing, 133, 136, 137, and 10 Cushing, 352, 353, show that a like doctrine on the subject prevails in Pennsylvania and in Massachusetts. In 16 Peters, 501, 502, Judge Story, in delivering the opinion of the Supreme Court, said that if "a mortgagor procures a policy on the property against fire, and he afterwards assigns the policy to the mortgagee, with the consent of the underwriters (if that is required by the contract to give it validity) as collateral security, that assignment operates solely as an equitable transfer of the policy, so as to enable the mortgagee to recover the amount due in case of loss. But, it does not displace the interest of the mortgagor in the premises insured. On the contrary, the insurance is still his insurance, and on his property, and for his account. And so essential is this, that if the mortgagor should transfer the property to a third person, without

the consent of the underwriters so as to divest all his interest therein, and then a loss should occur, no recovery can be had therefor against the underwriters, because the assured has ceased to have any interest therein, and the purchaser has no right or interest in the policy."

Consequently, if in the present case, the conveyance which divested the plaintiff's interest had been to another person than the mortgagee, the insurance would, from the date of such conveyance, have been to all intents and purposes, at an end. The authorities define so clearly the rule of decision and the principle from which it is deduced, that we would not be at liberty to consider the convenience or expediency of the rule, or to inquire into probabilities of justice, or injustice, in the result of its ordinary application.

The comparative magnitudes of the mortgage debt and the sum insured, cannot affect the question of the application of the rule. Nor can its application be affected by the circumstance that the person to whom the absolute conveyance in fee has been made, was the same party to whom the policy had been previously assigned with the assent of the insurers. If the question depends upon the change of interest, not the insurance, but in the subject of insurance, these distinctions cannot be attended with any material difference. We have seen that the approval by the defendants of the assignment of the policy to Conine, though a recognition of him as the substitute of the plaintiff to receive the payment of a loss, had not been a dispensation with any former condition of the contract as to a change in the ownership of the subject of insurance. In two of the cases which have been cited, the transfer by a partner to his copartners of his interest in an insurance of property of their firm had introduced no new person as a party insured. The doubt in those cases did not arise from the identity of the person, but from the identity of the character of the interest which, by the transfer, had been changed, as to the remaining partners, in proportion, but not in kind, though it had been absolutely determined as to the retiring partner.

In the present case, not only was the plaintiff's interest, and with it, his protective dominion and control, forever determined by the

conveyance in question; but this dominion and control were irrevocably vested in Conine, by whom they could not previously have been exercised; and the character of whose interest was thus entirely changed. His personal identity as mortgagee was, therefore, so far as the reason of the rule is concerned, immaterial.

The case thus appears to be completely covered by the authorities. They show that there could not be a recovery of the insurance in an action at the suit of either Conine, or the present plaintiff. The verdict must, therefore, be set aside, and a new trial ordered.

GRIER, J.—I fully concur with my brother Cadwalader in all his views, as above expressed.

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*In the District Court of the United States for the District of Wisconsin.*

THE MARKET BANK OF TROY *vs.* JOHN B. SMITH, GARRET VLIET, JASPER VLIET AND DANIEL H. RICHARDS.

1. The statute of the State of New York, that no corporation shall interpose the defence of usury, does not extend to suits against accommodation endorsers for corporations.
2. Where the law of a State forbids a corporation taking over a certain amount of interest, is a contract for a greater amount void? If not void, the surplus interest paid should be credited to the debtor, as not collectable.

The opinion of the court was delivered by

MILLER, J.—This suit is against the defendants as endorsers of a promissory note, of which the following is a copy:

$20,000. OFFICE OF THE MILWAUKEE AND HORICON R. R. Co., *Milwaukee, Wis., March 23d,* 1858.

Three months after date for value received, the Milwaukee and Horicon Railroad Company promise to pay to the order of J. B. Smith, Jasper Vliet, Garret Vliet, and Daniel H. Richards, with interest, twenty thousand dollars, payable at the American Exchange Bank, in New York; having deposited herewith as collateral security, with authority to sell the same on the non-performance of their promise,

in such manner as the holder hereof may deem proper, either at public or private sale, and apply the proceeds hereon, sixty of the first mortgage bonds of this company of one thousand dollars each, payable in 1878, with the coupons that fall due November 1, 1857, attached.

*Endorsed.* *Milwaukee & Horicon Railroad Company, by*
J. B. SMITH, J. B. SMITH, *President.*
JASPER VLIET,
GARRET VLIET,
D. H. RICHARDS.

This note was given to the Market Bank in lieu of other notes, amounting in the aggregate to the sum of twenty thousand dollars, that had been previously negotiated at the bank. The negotiation for a loan on those notes to the company was commenced at the instance of the company, through a resident of Milwaukee, who was a relative of the cashier of the bank. By a private agreement, interest at the rate of seven *per cent.* was paid, and exchange, and also a bonus to the agent, which was divided between the agent and the cashier of the bank. The exchange was charged and paid, at the rate of exchange between Milwaukee and New York, which was much higher than that between Troy and New York. On the giving of the note in suit, the same conditions were contemplated, but they were not carried out. The agent received the collaterals and the bank holds them.

The plaintiff is a banking association under the general banking law of the State of New York, located in the city of Troy; where it can do business, and not elsewhere. This was a contract made and executed in the State of New York; and it must be controlled by the laws of that state. By those laws, the rate of interest upon the loan or forbearance of money is seven *per cent.* And no person or corporation shall directly or indirectly take or receive, in money, or in any other way any greater sum. And all bonds, bills, notes, assurances, conveyances, and all other contracts or securities whatsoever, (except bottomry and respondentia bonds or contracts) and all deposits of goods, or other things whatsoever, whereupon or whereby there shall be reserved or taken, or secured, or agreed to be reserved or taken any greater sum or greater value for the loan or forbearance of any money, &c., shall be void; and any per-

son receiving interest in violation of the law, shall be deemed guilty of a misdemeanor, and on conviction shall be punished by a fine or imprisonment. In April 1850, an act was passed, that no corporation shall hereafter interpose the defense of usury in any action.

Associations formed under the general banking law of the State of New York, according to decisions of the courts of that State, are not bodies corporate and politic within the spirit and meaning of the Constitution of the State; but they are nevertheless corporations for all practical purposes. And they are subject to the general laws of the State regulating the rate of interest. The books of reports of the State contain many cases in favor of and against banks and banking institutions involving the question of usury.

The proof shows that the original notes were given to the bank by the Railroad Company, endorsed by these defendants as payees, on a loan of money by the bank to the company. If the original notes were void for usury, the note in suit is to be considered void. *Armstrong* vs. *Toler*, 11 Wheaton, 258; *Jackson* vs. *Packard*, 6 Wend. 415; *Tuthill* vs. *Davis*, 20 John. 285; *Andrews* vs. *Pond*, 13 Peters, 65; *Walker* vs. *The Bank of Washington*, 3 Howard, 62. If the charge for exchange was a cover for usury, the contract was usurious and void.

In the case of *Leavitt* vs. *Curtis*, 15 N. Y. Rep., 9, it is decided, in effect, that under the act of April 1850, a corporation cannot set up usury in any way to defeat a contract otherwise valid. And in the *Southern Life Insurance and Trust Company* vs. *Packer*, 17 N. Y., 51, it is decided that the act applies to foreign corporations litigating in the courts of that State. In the opinion, the court use, in reference to the act, the words "this partial repeal of the usury laws." The act is not to be considered a repeal of those laws, but merely a prohibition of the defense of usury, on the part of corporations, in the courts of the State. It is not intimated in either of the cases, that the act was intended to include accommodation endorsers for corporations. The contract or transaction may be usurious; but that shall not be allowed to be pleaded in the courts of the State, by a corporation. Corporations alone are prohibited from interposing the defense of usury. The system of the

usury laws of New York, for the protection of individuals makes usurious contracts void; but the contracts of corporations are made an exception, by the act, merely to the extent of their interposing the plea of usury in the courts. The act declares it to be the policy of the State to withhold protection only from corporations. The act does not make contracts of coporations, to give more than seven *per cent.* interest, valid. It merely withdraws protection from corporations. The usury laws are left in full force against the lender. The note of the Railroad Company, and the endorsement of the defendants, were but one transaction. The endorsers were essential parties to the tranaction. If the act had prohibited the defense on all contracts of corporations, then the defendants might be included in the prohibition. The defendants are so far parties to the note, as accommodation endorsers, that they may object to its payment for usury. *Jones* vs. *Hoke*, 2 Johns. C., 60; *Wilkie* vs. *Roosevelt*, 3 Johns. C., 206; 11 Wend. 329; 8 Paige, 641; 9 Id., 197; 7 Id., 602.

In the case of *Bock* vs. *Lauman*, 24 Penna. State Rep., 435, it is decided that a bill of exchange drawn at Buffalo, by the agent of a Railroad Company, to the order of the President of the Company, and endorsed by the defendant when it was negotiated in New York, on an usurious loan, was void as to the endorsers; although by the act of 1850, it should be valid against the company. That is the only adjudicated case on this subject. And, although it is not of equal authority with a decision of the Court of Appeals of New York, upon the construction and force of a statute of that State, yet it is a decision of a highly respectable court, and worthy of favorable consideration.

The law of the State of New York in the most positive terms forbids corporations from receiving a greater amount of interest than seven *per cent.*

It was argued by counsel, that independent of the penalty for usury, the note in suit should be considered void as a contract for a greater amount of interest than a corporation was allowed by law to receive. In the case of *Fleckner* vs. *The Bank of the United States*, 8 Wheat., 338, the court say: "The act incorporating the

Bank of the United States does not avoid securities, on which usurious interest may have been taken; and the usury laws of the State cannot be set up as a defense to a note, on which it is taken. It is merely a violation of the charter for which a remedy may be applied by the government." But in the subsequent case of the *Bank of the United States* vs. *Owens*, 2 Peters, 527, the court decide that such a contract and loan on the part of the bank are void on general principles. The court remark: "Courts of Justice are instituted to carry into effect the laws of a country, and they cannot become auxiliary to the violation of these laws. There can be no civil right, where there can be no legal remedy; and there can be no legal remedy for that which is in itself illegal." Such has also been the rulings of the Supreme Court of Ohio. *The Bank of Chillicothe* vs. *Swayne*, 8 Ohio Rep., 257; *Creed* vs. *The Commercial Bank of Cincinnati*, 11 Id., 489; *The Miami Exchange Company* vs. *Clark*, 13 Id., 1, also in 5 Connecticut Rep., 560. It is well understood that a corporation created by statute is a mere creature of the law; and can exercise no powers, except those which the law confers upon it, or which are incident to its existence. *Head and Amory* vs. *The Providence Insurance Company*, 2 Cranch, 127; *The Bank of the United States* vs. *Dandridge*, 12 Wheat., 64; *The Bank of Augusta* vs. *Earle*, 13 Peters, 587; *Perrine* vs. *The Chesapeake and Delaware Canal Company*, 9 Howard, 172; *Pearce* vs. *The Madison and Indianapolis Railroad Company*, 21 Howard, 441. Whenever a corporation makes a contract, it is a contract of the legal entity of the artificial being created by its charter. The only right it can claim are the rights which are given to it in that character. A corporation can make no contracts and do no acts, except such as are authorized by its charter; and those acts must be done by such officers or agents, and in such manner as the charter authorizes. The public have an interest, that banks shall not impose upon the necessities of their customers. Banks are created for the accommodation of the public, and they should not be allowed to assume a power of oppression. It is not the duty of the courts to lend their aid in carrying out contracts of banks, prohibited by their charter, or the laws of their State. Public

policy as well as public interest require that usurious contracts, or loans of banks upon an amount of interest forbidden by law, should not be enforced by the courts. But as I have come to the conclusion, that these defendants can plead, in their discharge, the law of the State of New York against usury, it is not necessary to consider further this last subject. At all events, the surplus interest paid over the legal rate, should be credited to the debtor, as not collectable.

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*In the Supreme Court of the State of Tennessee, at Nashville, December Term,* 1858.

CORNELIUS FARRIS *vs.* KIRKPATRICK'S HEIRS AND ADMINISTRATOR.

Where partners make a settlement under the sanction of an award of referees, and certain conveyances are made in pursuance of such settlement, and it afterwards turns out, upon a second reference, that the partnership dealings and accounts are adjusted in another manner by reason of a mistake in the first reference, but the matter of the division of certain land was not brought before the second reference, equity will enjoin, by perpetual injunction, an action of ejectment brought by one against the other.

The opinion of the court was delivered by

CARUTHERS, J.—Complainant and John Fitzpatrick, defendant's intestate, were partners for several years in a saw and grist mill. In December, 1853, they made an agreement in the settlement of their affairs, which was reduced to writing. After this, in March, 1854, they made a reference to arbitrators of all matters in controversy between them at that time, by whom an award and final settlement was made, which, it is said, was satisfactory, and the parties acquiesced in it. It seems that the difficulty which produced this suit arose out of the construction of the award and settlement, as to their extent and effect.

The settlement of 1853 is signed by the parties and attested by two witnesses, and is thus briefly stated by them: "We find upon a full settlement that Farris is indebted to said firm $2,802 81, and that Fitzpatrick is not indebted to said firm. Said Fitzpatrick takes the tract of land known as the 'Peter tract,' and another

known as the 'Riley tract,' and said Farris is to have the 'Mill Place,' upon paying Fitzpatrick $1,485 40." Each party took possession accordingly. The deeds for all these lands had been made to Fitzpatrick individually, but it is admitted on all hands that they were paid for out of the firm means, and consequently were partnership property.

It seems that the parties were not satisfied with their settlement of 1853, and in March, 1854, submitted their accounts to four competent friends to review, and finally adjust them. This was done upon a laborious examination, and the result was, as stated in writing, that Farris, instead of being indebted to the firm $2,802, as supposed in their previous settlement, only owed it $12 62, which was then paid. Upon this award the parties say in writing, on the same day, "We, the undersigned, agree to the settlement of which the within is a condensed statement, as a final conclusion of our old partnership. March 3, 1854."

It is proved that the matter of the division of the land was not brought before these referees, as that was not understood to be in question, having been previously divided by the parties; but only their accounts were in dispute. There can be no doubt but that such was the understanding of the parties; that they were content with the division they had made, but only differed about their partnership dealings and accounts, which alone were submitted to the arbitrators.

Very soon after this, Fitzpatrick instituted his action of ejectment against Farris upon his legal title. To perpetually enjoin that action, and compel Fitzpatrick to make him a title under their agreement in writing of December, 1853, as to the division of their partnership lands, this bill was filed.

Can the object and prayer of this bill, upon the facts we have stated, be resisted? The Chancellor thought not, and so do we.

The objections of the defendant are all untenable.

1. The argument is unsound, that under the statute of frauds, as expressed in the case of *Shield* vs. *Stamps*, 2 Sneed, 272, and the authorities there cited, in relation to the necessity of setting forth in the writing the particulars of the contract, would render this

writing void. This doctrine does not apply to a case like this. There the lands belonged to the parties as a firm, and were well described in the deeds, and nothing more was required in a division between themselves, but to designate the tracts assigned to each by such terms as would be well understood, or the general application by which they were known. The "Peter tract," the "Riley tract," and the "Mill tract," were sufficient. If any uncertainty or ambiguity existed, it could only be explained by parol.

If there were two mill tracts, proof would be required to ascertain which was meant. But here there was but one "mill tract" owned by the firm, and there is no uncertainty.

2. The $1,480 to be paid by Farris was no part of the consideration, nor a condition to the transfer of that tract. It is manifest from the circumstances, that the division of the lands had no connection with that matter. By the mistake of the parties it was then supposed that Farris was indebted to the firm $2,800, to the half of which Fitzpatrick was entitled, and that was stated in connection with the partition of their lands, and it may be that the latter intended in this way to secure a lien upon half of the land assigned to the former for its payment; and that would be unobjectionable if such was the object, and it was properly done. But then it turned out afterwards, by the award of arbitrators, that this was all a mistake, and nothing at all was due from Farris to his partner. This certainly removed all difficulty on that point, and left the title to the mill tract unencumbered under the previous written agreement.

It appears that Fitzpatrick was a professional man of information and experience, and his partner a laborious, uninformed man. They were unequal in this respect, and it is not surprising that such mistakes as might occur in the case would most probably be against Farris. This may account for the very great difference in the result when their complicated accounts were placed in the hands of competent men for adjustment.

We think justice has been done by the Chancellor, and affirm his decree making the injunction perpetual, and vesting the title to the mill tract in Farris.

WILSON POLK AND OTHERS, *vs.* THOS. H. FANCHER AND OTHERS.

1. Where a negro slave, confined in jail on the charge of rape and murder, was taken by the defendants, acting in concert with a mob, from the sheriff's custody and hanged, it is such a deliberate, premeditated and violent destruction of the plaintiff's property, as to entitle him to vindictive damages.
2. It is not permitted to prove, in such case, in order to diminish the pecuniary value of the slave, that he was apprehended for rape and murder; was infamous, and therefore of no value.

CARUTHERS, J.—This was an action on the case with one count in trover, and another in case, brought against the defendants in White Circuit Court, to recover damages for killing their negro man slave, Austin. The verdict and judgment were in favor of the plaintiffs for *one cent* damages, and *they* bring up the case by appeal in error.

The Court permitted the defendants to prove the character of the slave to be bad, and to give their opinions that he was of no value on account of his infamy. Most of them stated that they had never seen or known him until he was apprehended for rape and murder, and put into the jail at Sparta, and in view of that charge hanging over him, they considered him worth nothing. Objections to all this evidence were overruled, and it was permitted to go to the jury. This, we think, was clearly erroneous. It is easy to see in a case like this what a powerful effect such proof would have upon the minds of a jury.

The case was one of extraordinary aggravation, in which all law was set at defiance, public justice insulted, and the life of a human being, already in manacles, lawlessly destroyed. He was charged with the shocking crimes of rape and murder combined. But the officers of justice had performed their duty, and had him safely incarcerated in jail to await the vengeance of the law, in case the guilt was established according to its forms. There was not the least necessity that the defendants should interfere after the criminal had been secured and disarmed of all power of resistance or of flight, and shed human blood, even of a slave, without trial or condemnation. If the slave were guilty of the crimes imputed, no punishment would be too severe for him, and so by the law the

penalty is death—death by hanging—the mode adopted by the defendants without and against law. But no man, whether bond or free, is to be condemned without a hearing—a fair and impartial trial. There is neither valor nor patriotism in deeds like these. Not valor, because there is no contest, the victim is already in bonds and harmless; nor patriotism, because the country has provided for the proper and legal punishment of offenders, and needs not the aid of mobs and lawless combinations to wield the sword of justice or quicken its stroke. No matter how great the malefactor may be, whose life is thus taken, without law, a feeling of alarm and insecurity pervades the whole community, when one of these shocking deeds of violence is perpetrated. No man can tell what unfortunate concurrence of circumstances may raise the storm of popular fury against him, though he may be innocent, and bring speedy destruction upon him, if these examples are to be tolerated. All good citizens, every one who values his own safety, or has any regard for law and order, should unite in rebuking, in all proper modes, these outrages upon the lives of men, and obstructions of the course of law and justice. The courts and juries, public officers and citizens, should set their faces like flint against popular outbreaks and mobs in all their forms. The security of life and property imperiously demand this course in a country where the protection of rights is dependent upon the law, and not upon artillery and bayonets, as in despotic governments. There is no safety in a free government but in a strict observance and rigid enforcement of law. It is the only protection of the weak against the strong, or the few against the many. This slave was well secured in jail to abide his trial, and answer the demands of justice against him, even with his life. There was no chance for escape.

Some of the defendants, by written agreement to stand by each other, and others without having signed it, moved by concert to the jail, broke down the door, took out the negro, and hung him till he was dead. It may be that he was guilty, but that was no good reason why others should bring the blood of murder upon themselves by taking life without authority of law, and in contempt of public justice. If he were guilty of the enormous crimes charged against

him, it was not then made manifest by a trial, and his guilt had not been established. The presumption of innocence can only be removed by proof upon a legal trial. It must be taken, then, for the purposes of this suit that no crime had been committed by the victim of this wanton outrage. The jury should have been so instructed, and no proof of character based upon this charge should have been admitted. This would involve the necessity of trying the truth of all such charges to ascertain what weight should be given to the opinion. It is easy to see that this mode of ascertaining damages from the value of the slave based upon character, with reference to the truth of the charge, would always make a case of nominal damages in cases of this kind. Witnesses would readily say, that as the slave was guilty of murder, and confined in jail to be hung for it, he was of no value. That is not the rule in such a case. His value should be determined from age, appearance, health, and with all these, what he would sell for in the market, not what A, B or C would give for him, or what he was worth if the charge were true. They recklessly slew him, and his guilt can never be legally made out. This misguided zeal to avenge the wrongs of others has deprived society of an example to deter evil men from crime, and presented an example of all others the most alarming to any well-ordered community. The general moral traits of character, as well as physical condition, would constitute elements in the estimation of value, but without reference to the accusation upon which he had not been tried, and as to which the law presumed his innocence, until the contrary was made legally to appear. It was not for the defendants to adjudge that question, nor for witnesses to form and give their opinions as to his value upon the supposition of his guilt.

We think his honor also erred in holding that this was not a case in which the jury might go beyond the actual value, and give exemplary and vindictive damages. It was a deliberate, premeditated and violent destruction of the plaintiff's property, in disregard of both the civil and criminal laws of the State, and of most evil example. It is just the kind of case in which the jury ought to have been allowed to vindicate the law by going beyond this value, and

giving exemplary damages. In the case of *Johnson* vs. *Perry*, 2 Hump., 579, where the action was like this for injury to a slave, the court say: "the jury may give *smart money* as a punishment for aggravated circumstances attending the wrong."

In *Tillotson* vs. *Cheatham*, 3 J. R., 46–64, which was an action for beating a horse to death, it was held that as it was a case of "wantonness and cruelty, the jury had a right to give smart money." This was the charge of the Circuit Judge, and the Supreme Court said it was correct, and that they would have been better satisfied with the verdict if it had been more *exemplary*. The Supreme Court of Connecticut, 10 Conn., 384, hold that for injuries to personal property "the jury is not restricted to the pecuniary loss of the plaintiff."

These cases and many others are cited in Sedgwick on Dam. 454, 464. The reason of this rule is, that, in aggravated cases, the damages should be such as not only to remunerate or compensate the plaintiff, but to operate as a punishment of defendant, and an example to deter others from like offences. This principle is every where regarded as one of most salutary influence in the administration of justice, tending to prevent wrongs by the double operation of punishment and example.

The plaintiffs proved their title to this slave, and that he was killed by the defendants, and should have recovered his market value at least. This verdict was a mockery of justice.

The judgment will be reversed, and a new trial granted.

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BENJAMIN BARNES *vs.* ANDREW GREGORY.

1. The power of the Court of Equity to reform deeds in cases of fraud, is constantly exercised, and cannot now be questioned.
2. Where the proof leaves no doubt that the sale of land was by the acre, and not in gross, and was so understood by both parties, and the vendee receives more land than he pays for, the vendor can compel payment for the whole quantity sold.

CARUTHERS, J.—The complainant sold to the defendant a small tract of land on Stone's river, in Davidson county. The deed gives

a description of the land, and states that it contains "thirty acres, more or less," and the consideration $1,000.

This bill is filed to correct a mistake as to the quantity of land to the extent of fifteen acres, and claiming $35 per acre for the same. It is charged that the sale was by the acre, and the quantity to be ascertained by a survey; that before the execution of the deed the survey was made by one Hamilton, and the quantity ascertained, and concealed from him, and his deed obtained, and notes executed for thirty acres instead of the true quantity of forty-five acres.

The defendant denies that the sale was by the acre, but insists that it was in gross; that he was to give $1,050 for the tract; that he was by the contract to have it, as containing thirty acres, whether it were more or less than the quantity. He relies upon his deed as written evidence of the contract, which cannot be changed by parol.

The proof leaves no doubt upon the mind, as to the contract having been a sale by the acre, and not in gross. It is clearly established that it was so understood by both parties, both by their actions and declarations, though the defendant sometimes denied it. The fact that a survey was to be made before the execution of the last note, for the consideration and the deed, is almost conclusive of that fact. It is entirely so, when combined with the declarations of both parties at, before and after that time.

The testimony also raises as strong presumption, that the defendant knew of the excess before the writings were drawn and signed, and concealed it from complainant. The facts are, the survey was made by Hamilton on the day agreed upon, but the calculation was not made on that day, but was to be made out that night, and on the next day the parties were to meet at the house of complainant, and execute the writings, the contract still resting in parol. The surveyor and the defendant went and staid together at the house of a neighbor, and returned next day, about dinner time, with the deed and notes, and being in a great hurry, procured it to be signed by the complainant, delivered his notes, and went off. At the time of signing the deed, complainant inquired whether the survey made

out more or less than thirty acres, and referred to the contract, that whether more or less, the price agreed upon was $35 per acre. The defendant asserted that he did not know how much there was, but he was to pay $1,050 for the tract, or $35 per acre for thirty acres, without regard to the actual number. So, after a short conversation, he went off in haste, having, as he said, urgent business of an official character to attend to at home, carrying the deed with him. It is impossible for the mind to doubt from these facts, that he and Hamilton had made a calculation upon the filled notes that night, at least so far as to be convinced that the tract exceeded thirty acres, and that this fact was purposely concealed from the complainant. It appears that the complainant was weak and sickly, and about sixty years of age. It may be, that Gregory said what was literally true, when he asserted that *he* had not made an accurate calculation of the quantity, and that he did not know the exact quantity. But that he did know there were more than thirty acres, there can be no question. He should have stated this fact to complainant, and not suppressed it, when inquired of on that point, and more especially as he was with the surveyor acting for both parties.

But still it is contended that the deed must be taken as containing the true and full contract, and that no parol testimony can be heard to change or reform it.

That such is the general rule both at law and equity, no one will be heard to question. But it is just as unquestionable that this may be done where clear proof is made of fraud, or mistake. Both positions are too familiar to permit a reference to authorities.

The power of a Court of Equity to reform deeds in case of fraud or mistake was exercised by this court in *Williams* vs. *Conrad*, 11 Humph., 415; 8 Humph., 230, and 1 Id., 433. The authorities are all collected in White and Tudor's Lead. Ca. Vol. 2, pt. 1, 558 to 596.

But in this case perhaps it is unnecessary to resort to the doctrine of *reforming* deeds, by the proof of mistake or fraud. The deed perhaps gives the boundaries correctly according to the survey, and needs no change, but the statement of the quantity of land contained in those limits is inaccurate, and so is the amount of the

consideration. That the consideration stated in a deed is only *prima facie*, and may be controverted by parol, has been often held. This deed is silent as to the disputed question, whether the sale was by the acre or in gross. To establish the former, and obtain pay for the *whole* quantity sold is the object of the bill. This fact may be made out by parol or extrinsic written evidence. At the last term in Knoxville, in the case of *Bently* vs. *Miller and Wife*, not yet reported, we gave relief to the purchaser, Bently, upon the ground that the sale was by the acre, as proved by extrinsic evidence, where the deed was like the present, because of a deficiency of acres. Such is the uniform course of decision, where there is a substantial deficiency, and the contract by the acre, or even in gross when there is fraud or imposition. Not so where the contract is fair, and the sale is by the tract upon the judgment of the parties. The same rule must apply under the same circumstances, in favor of the vendor where there is an excess for which by mistake or fraud, he received no compensation, or has been deprived of the benefit of his contract of sale by the acre. *Horn* vs. *Denton*, 2 Sneed, 125.

The complainant, then, is entitled to relief upon the grounds of his actual contract, the mistake in the settlement, carried into the writings executed, and for the fraud of the defendant.

The decree of the Chancellor will be affirmed with costs, and the cause remanded for further proceedings upon his decree, which is in all things correct.

## RECENT ENGLISH DECISIONS.

*In the Exchequer Chamber, February*, 1859.

### PAUL *vs.* JOEL.

In an action by the endorsee against the drawer of a bill of exchange on B, the following writing was held to be a sufficient notice of dishonor:—"B's acceptance to J," (the defendant,) "for 500*l.*, due on the 12th January, is unpaid. Payment to R. & Co. is required before four o'clock."

This was an appeal from the decision of the Court of Exchequer. The facts of the case and the arguments in the court below are fully

reported 4 Jur., N. S., 1086, nom. *Paul* vs. *Jewell*. The plaintiff sued, as public officer of a provincial banking company, against the defendant as drawer of a bill of exchange, which had been endorsed to the company. At the trial, the manager of the London office of the company deposed, that on the day after the bill became due he took it to the defendant's office, and asked a clerk there if the defendant was within; the clerk replied that the defendant was within, and asked the witness his name and business. The witness replied that he should write down his business, and wrote on paper the words—"Bosworth's acceptance to Joel for 500*l*., due on the 12th January, is unpaid. Payment to Robarts & Co. is required before four o'clock." The witness gave this paper to the clerk, who said he would take it to the defendant, and went away with it; shortly afterwards returning, and delivered for answer, "it should be attended to," but did not expressly state that he had seen the defendant. It being objected that this paper was not a sufficient notice of dishonor, the learned judge left the case to the jury, who found for the plaintiff, leave being reserved to move to enter a verdict for the defendant. A rule having been obtained, cause was shown on the 27th May, 1858, against it, and the Court of Exchequer ultimately discharged the rule; and it was against this decision that the appeal was brought.

*Hannen*, for the defendant below.—The question is, whether this notice of dishonor is good within the decision of *Solarte* vs. *Palmer*, (2 Cl. & Fin. 73.) That case is to be followed, being a decision of the House of Lords; any case falling within its principle must be governed by it until it is reversed by Parliament. Lord Campbell, C. J., in *Everhard* vs. *Watson*, (1 El. & Bl. 801,) has, indeed, remarked that *Solarte* vs. *Palmer* had caused much confusion; but the principle of it was, that the notice of dishonor must, by necessary implication, convey to the party that the bill had been dishonored—i. e. had been not only not paid, but presented for payment, and not paid. Here there is nothing to lead to the inference that it had been presented, beyond the mere fact of the notice itself having been given. If the party had neglected to present the bill, this is the notice he would have given. [*Byles*, J.—*Bailey* vs.

*Porter*, (14 M. & W. 44,) is exactly this case, is it not?] There must be a presentment shown. (*Strange* vs. *Price*, 10 Ad. & El. 125.) In all the cases collected in Byles on Bills, 236, 7th ed., except *Bailey* vs. *Porter*, there were found the same words expressing that the bill had been dishonored or returned, and those words are not in this notice. In *Bailey* vs. *Porter* the holder of the bill was a banker, at whose house the bill had been made payable; all was done that could be done, and no presentment was necessary to be proved. [*Crompton*, J.—The notice in *Solarte* vs. *Palmer* was a notice of action, in fact; and it seems now to be established that the Courts are not to be bound by it, except in circumstances exactly similar.] [He cited *Furze* vs. *Sharwood*, (2 Q. B. 388,) and *Allen* vs. *Edmundson*, (2 Exch. 719.)] [*Crompton*, J.—I much prefer the decision in *Bailey* vs. *Porter* to that of *Furze* vs. *Sharwood*. *Crowder*, J.—In *Hedger* vs. *Steavenson*, (2 M. & W. 799,) Parke, B., said he was not prepared to be bound by all the reasons given in the House of Lords for the decision in *Solarte* vs. *Palmer*. *Byles*, J.—But for *Solarte* vs. *Palmer* and *Hartley* vs. *Case*, (4 B. & Cr. 339,) there would not be a doubt about the matter.]

*Archibald*, for the plaintiff below, was not called on.

WIGHTMAN, J.—We are all of opinion that the judgment of the Court of Exchequer must be affirmed. *Solarte* vs. *Palmer*, which was the great case relied on by the defendant's counsel, is clearly distinguishable, because there was no communication of the dishonor there; there was simply a demand of payment; and it was mainly on that ground that the decision of the House of Lords turned. In many cases *Solarte* vs. *Palmer* has been commented on. But where, as in *Hedger* vs. *Steavenson*, in the terms used there is no doubt that by reasonable intendment it is to be inferred that the bill has not been paid, though in express terms it does not appear that the bill had been presented and dishonored, that is sufficient. That is one decision. Another is *Bailey* vs. *Porter*, where the defendant was informed that the bill was unpaid. That was held to be sufficient. Here the notice is, "Bosworth's acceptance to Joel for 500*l*., due on the 12th January, is unpaid. Payment to Robarts

& Co. is required before four o'clock." That agrees with the cases I have mentioned, and *Bailey* vs. *Porter* has been referred to on many occasions as an authority, and we think it governs this case.

*Judgment affirmed.*

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*In the Court of Exchequer, June,* 1859.

GOODWYN *vs.* CHAVELEY.

Plaintiff's men were driving thirty-six oxen along the road between five and six o'clock of an evening in November; twenty-three escaped into a field of defendant's adjoining the road, through gaps in his fence. The men drove on the remaining thirteen to the nearest obtainable place of safety for the night, and returned (having been absent about an hour) for the other twenty-three left in defendant's field. Defendant had then impounded them, for which the plaintiff brought this action. The learned judge at the trial directed the jury that, under the circumstances of the case, the plaintiff's men had not removed, or tried to remove, the cattle within a reasonable time, and directed a verdict for the defendant:

*Held*, (Bramwell, B dissentiente,) to be a misdirection; that it was not a question of law for the opinion of the judge, but a question of fact upon the evidence given, that should be determined by the jury, and consequently there must be a new trial.

This was an action against the defendant for impounding the plaintiff's cattle. Defendant pleaded that he took them damage feasant in his close. Plaintiff replied that his cattle were lawfully going along a road, when other cattle were being driven along the road; that plaintiff's cattle escaped into defendant's close, and that plaintiff within reasonable time removed them, but that defendant had impounded them before reasonable time had elapsed for plaintiff to remove them. Defendant joined issue thereon.

The plaintiff's man, assisted by another person, was driving thirty-six oxen along the highway about half-past five o'clock at night in the month of November; some twenty-three escaped into the defendant's field through the gaps in his fences adjoining the road; thirteen remained outside in the road. The man drove on the thirteen to the nearest place he could find for them, and there lodged them for the night. He then immediately returned for the

others in defendant's field, but found the defendant had impounded them. The men were absent from the twenty-three in defendant's field about an hour. The cause was tried before Bramwell, B., in Essex, who directed the jury that the plaintiff's men had not, under the circumstances, removed the cattle, or tried to remove them, within a reasonable time, and therefore defendant had not impounded them before a reasonable time had elapsed for their being removed, and directed a verdict for defendant. A rule *nisi* having been obtained for a new trial, on the ground of misdirection,

*Hawkins*, Q. C. and *Turner* showed cause.

*Honyman*, contra, in support of the rule.

The following authorities were cited:—*Ramchum Mullich* vs. *Luchmeechund Radakizen*, 9 Moore P. C. C., 46; Taylor on Evid. sect. 31; *Tennant* vs. *Bell*, 9 Q. B., 684; *Hunter* vs. *Caldwell*, 10 Q. B., 69; *Attwood* vs. *Emery*, 1 C. B., N. S., 110; *Phillips* vs. *Irving*, 1 M. & G., 325; *Burton* vs. *Griffiths*, 11 M. & W. 817; *Temple* vs. *Pullen*, 8 Ex., 389. *Cur. adv. vult.*

*June* 14.—BRAMWELL, B.—This case was tried before me, and unhappily we are not all agreed. I have the misfortune to be alone in the opinion I entertain—an opinion which I expressed at the trial, and, unfortunately, abide by, and which I must now express. But, in order to make the judgment I have to deliver more intelligible, I will shortly state what the question was. The plaintiff complained of a trespass, that his cattle had been taken and impounded; the defendant pleaded that he took them damage feasant in his close. The plaintiff replied that the cattle were lawfully going or being driven along a road, and at the same time some other cattle were being driven along the road; that they escaped into the defendant's close, and that he the plaintiff, within a reasonable time, removed them, but the defendant impounded them before a reasonable time had elapsed for him the plaintiff to remove them. Upon that the defendant took issue, and the question at the trial was, whether the defendant impounded these cattle and removed them from his close before a reasonable time for the plaintiff to remove them had elapsed. Upon the trial it appeared that the plaintiff's men were driving upwards of twenty-two oxen along the road—

twenty-three or twenty-two, it is not material. The plaintiff's man was assisted by another drover; it was night, and there were gaps in the fences of defendant's field, who was not shown to be under any obligation to fence; through these gaps the cattle in question escaped into the defendant's field. All the cattle did not escape; seven or eight escaped into the defendant's close, the rest, the larger portion, remained in the road. The plaintiff's men, thinking it better to leave the cattle where they were in the defendant's field in safety, drove the others on, instead of leaving them in the road unprotected, to a place of safety, the nearest they could find, and there lodged and housed them for the night, and with all convenient speed came back to the defendant's close. When they arrived there, the cattle which had strayed into the defendant's close had been taken and impounded. It ought to be added that the plaintiff's witness very truly considered this; he said, "There was nothing to prevent me driving the cattle off the close before their getting into it, except that I preferred taking care of those which had not escaped into the close. I could have got them out sooner than I did." It was not necessary to say what time elapsed. I think it was about an hour between the time when the cattle got first into the close, and when the plaintiff's men were enabled to come back and take them away. It is not necessary to mention that, or to be particular as to the time, because it was admitted by the plaintiff's men, that they could have turned and got the cattle off the defendant's close before they were taken and impounded, had they thought fit, but they did not think fit, because they preferred to take care of the cattle which had not so escaped into the close. Now, upon that I ruled that the plaintiff's men had confessed, and their statement was not controverted by the plaintiff—it was assumed they were telling the truth—I ruled, that being taken to be so, it appeared upon the plaintiff's case, and it was admitted by him, that the plaintiff's men had not removed the cattle, or tried to remove them within a reasonable time, and consequently that the defendant had not impounded them before a reasonable time for their being removed had elapsed. Now upon that ruling of mine, accordingly I directed a verdict for the defendant, and my ruling

was questioned by a motion in this court for a new trial for misdirection. I propose to show why I think that ruling was correct. Now some confusion arose, as always does it seems arise in questions of this description, as to how far it is one of law or one of fact, how far it is open to a judge to determine it. I do not believe there is much difference upon the matter. I am of opinion that all these cases raise two questions: first, what is the rule of law to determine what is or is not reasonable; next, what are the facts to show whether they are brought with the rule. I do not know that one can instance it better than by the case so often mentioned in the course of the argument. A man gives an order for a coat to a tailor; the coat is brought home at the end of six months; the person who has ordered it refuses to take it, upon which an action is brought; the question is, whether the coat is tendered within a reasonable time. We will suppose the plaintiff to admit that the ordinary time within which a coat is made and delivered is a week or ten days, or something of that sort, at all events six months is a great deal longer than the ordinary time. In a case of that kind I am clearly of opinion that the judge may direct a verdict for the defendant. He may say, "The law is, a man is bound in a case of this description to deliver the article or tender it within a reasonable time, and that, reasonable time, in the absence of anything to control a particular engagement, is the ordinary time. I tell you, that being the law, the facts being admitted by the plaintiff that he did not do it within that time, you must find your verdict for the defendant." So here it seems to me, if I was right in holding, as I did hold, and as I think still, that a reasonable time to do it is a reasonable time for the act itself, without reference to extrinsic circumstances—inasmuch as if a man admitted he could have done it within such a time as that, but had taken a longer time because extrinsic circumstances made it desirable he should do so—it appears to me, if I was right in holding that proposition of law, that I was right in directing a verdict for the defendant. Of course I can perfectly well understand that there are cases in which a question of this description must be left to the jury. Suppose for instance, I put again the case of the coat; sup-

pose one set of witnesses say the usual time within which to deliver it is a week, and others say the usual time is a month, all the judge can say is, "Gentlemen, I rule it must be done within a reasonable time; it is for you to determine what that is." But it seems to me, where the facts are admitted, and being admitted that the time exceeds that which by law is a reasonable time, it seems that the judge is not only warranted, but is bound, to direct that a reasonable time has been exceeded, and direct a verdict for the party who makes that contention; just in the same way as he would be bound equally to direct a verdict for the plaintiff or the defendant in the case where the coat had been tendered in the ordinary time. So much for the first part of the discussion, as to which there was, and always will be, some confusion, I suppose, owing to the matter not being discriminated in the way in which it ought to have been. But now the remaining question is, whether I was right in holding that a reasonable time within which to do this was a reasonable time to do the act itself, without reference to extrinsic circumstances. I think it was. I think I was right, and I proceed to say why. The plaintiff had no right to have his cattle trespass on the defendant's land. The law is this; he has a right to take his cattle along the highway; and certainly if they do go along the highway and there are no fences in the adjoining land, it is certain that they will stray; therefore the plaintiff cannot prevent it, and as that is a necessary consequence of the enjoyment of the right of using the highway, why it is a necessary evil, I suppose, which those whose lands border on the highway must sustain; but that being the reason of the rule, it extends as far as reason points out, and no further; and, consequently, what you may call the right of the plaintiff, or his immunity from the consequence, extends no further than there is necessity for it. I own, I think that is pretty tolerably plain reasoning, and inasmuch as there was no necessity for these cattle stopping longer in the place than was necessary actually to turn them off, it seems to me manifest that they stopped there an unreasonable time, and, consequently, the defendant did not distrain them before a reasonable time for their removal had elapsed. It seems to me that the fallacy—which I have my Lord

Wensleydale's authority for saying is not a discourteous term to apply to those who differ from you—the fallacy of the argument on the other side is in considering this a case of reasonableness with reference to the situation of the plaintiff, if we may say so. I readily admit, if it had been the plaintiff's fault that the cattle had strayed, and that he had complained of his men for leaving them there, instead of at once turning them off, and saying, "Your behavior was not reasonable behavior," as his servants, they would have a very excellent answer, because they would have been at liberty to say, "It was the best thing we could do." The question is, not what was the best thing they could do for him, but what was the best thing they could do for the defendant, whose cattle had trespassed. In like way it may be, for any thing I know, that the public would rejoice and compliment these two drovers for leaving the cattle safely browsing upon the defendant's pastures, and taking the others to a place of safety, rather than leave them unprotected in the road, to wander about, and possibly do mischief. But it is the defendant's case to be considered, and not that of the public. I admit, if the question were, whether the drovers should be punished for what they have done, I say they ought not to be punished. But I say again, what are the defendant's rights in the matter? His right is to have his land trespassed on as little as posssible, to no greater extent than is absolutely necessary. I therefore think a reasonable time was such, and no more than was required for the act itself. The case was argued as though there had been some desperate hardship upon the plaintiff in this way of dealing with it; but there is none. His cattle are distrained and impounded. What then? He must get them out. What is the situation of the defendant? How long are they to browse upon his land? He cannot maintain any action. If he can maintain any action for the trespass in coming on to his land, it is admitted he would not be right in not proceeding to it. According to the argument that on the part of the plaintiff, rather than he should have the inconvenience of getting the cattle out of the pound, the defendant is to undergo the inconvenience of having his crops, whatever they may be—corn or any thing else—grazed upon until

the plaintiff could get a convenient and comfortable time to remove them; and for aught I can see, the same argument might go on to this extent, that they might continue in the plaintiff's field for twenty-four hours, because the men could not sooner have housed the remaining cattle. Suppose they were driving them and some of the cattle had been seized with a vagary and had gone into some other field; and suppose the question had been whether they might not have collected them and got them into a place of safety; if the question is which of these two parties ought to bear the loss, why should it not be the plaintiff? The plaintiff's cattle had no right in the defendant's field. If the question is whether the defendant's herbage and crops are to be grazed and browsed upon without any compensation till it is convenient for the drovers to come back and take them away; or on the other hand, the plaintiff is to be at the inconvenience of getting his cattle out of the pound, it seems to me this very consideration points to the plaintiff bearing the loss rather than the defendant. One of them must do it. I think, therefore, that the plaintiff's duty was to see that, so far as he may have had a right or an immunity from the consequences of the trespass in consequence of the cattle going into the defendant's land, it was a right and an immunity to the extent to which it was necessary, and no more. Then it was not necessary, because there was no physical impossibility that they should not be at once driven off, and if either party is to bear the loss, it seems to me it should be on the part of the plaintiff. One may put by the way another argument, which had escaped me, for the purpose of showing the hardship upon the defendant, the very circumstances of this case: he comes to his field, and he finds cattle quietly grazing there; there is no duty in anybody to leave them there, because, it was contended, the duty was to drive the rest of the herd on; there is no notice by the plaintiff when they would be taken away, or anything to indicate that he may or may not impound them. How long is he to remain? What is he to do? Is he to make inquiries of any one, and say, "Have you seen two careful drovers driving the rest of the herd along the road with the appearance of an *animus revertendi* to come and take them away? because, if so, I cannot

impound them." What is he to do? He can do nothing but impound them. For these reasons I think I was right to rule as I did. I thought it a clear case then, and I own, as a matter of reasoning, I think it a clear case now. I am sorry for it, because I probably am in the wrong, and, if so, I am very much in the wrong. I cannot change my opinion, and I am bound to express it in the way in which I have done.

MARTIN, B.—My opinion is, this point is essentially a question for the jury, and not a question of law, in my judgment, at all. It is said that the defendant in this case was not to blame. I do not say he is to blame. I am not aware that he could be indicted for not fencing his field from the road, which most people in this country do; they put fences between their fields and the road. If a man will not do that, it seems to me he must put up with some of the inconveniences consequent upon it. Now one of the inconveniences is, that cattle being driven upon the road will stray. But the facts of this case were these—that a man was driving twenty-three bullocks at nightfall in the month of November, and as he was driving them along, two or three of these bullocks went into a field, there being no fence to protect the road from the defendant's field; and that thereupon the man who was driving them, drove the remainder of the cattle—nineteen or twenty head of cattle—to some place, where they were secured, and immediately came back to bring the cattle out of the plaintiff's field. It seems to me that that man did all he reasonably could be required to do. He was under no obligation to leave the rest of his master's cattle to stray at nightfall upon the road, for the purpose of relieving the defendant from injury from the plaintiff's cattle, which had got into his field. In my judgment the main cause of this was, the man not doing what was ordinarily done, to have a fence to keep them off. It seems a right question for the jury, and not a question upon which a judge could take upon himself to direct absolutely a verdict one way or the other. The jury have found the man did not remove them as soon as he reasonably might have done. As I understand, they adopted that view, and I am inclined to adopt that view. That man had done all he possibly could do; there was no

obligation upon him to permit the other man's cattle to stray, and possibly be lost, for the purpose of relieving this man from the consequence of not having a fence between the field and the road. All I say is, it was a question for the jury, and I should not have been satisfied if they had found a verdict for the plaintiff at all, if the plaintiff was the man who brought the action for the trespass, and if they had found against the owner of the field.

POLLOCK, C. B.—I have also the misfortune to differ from my brother Bramwell. I think the rule for a new trial, which was founded on a misdirection of my brother Bramwell, ought to be made absolute. My brother Bramwell's direction is in substance this; that if more time was taken to remove the cattle than was reasonably necessary for that purpose, and that purpose only, and then the cattle were not removed within a reasonable time, that the defendant had a right to distrain them without reference to any other extrinsic circumstances whatever. I think that is not the law. I think it cannot be the law in any country where reason and good sense prevail. It certainly is not the law according to any authority that was cited. And then the question is, if a man who has land adjoining a highway will not do as persons who have any valuable crop growing upon it usually do, by fencing guard the land from the encroachment of cattle going along the highway; the question is whether he is entitled to require that the drovers (and I must assume that there were on this occasion the proper and reasonable number required for the cattle on the road,)—whether the owner of the land adjoining the road has a right to say, "You shall remove the cattle from my land, on which they have strayed," without reference to any other consideration upon the whole earth; if one of the cattle remaining on the road has trodden upon one of the persons who are there; or if some circumstance occurred that required the sheriff instantly to say, "I call on you, in the King's name, to assist to arrest a felon in the field," or "I call on you to prevent a breach of the peace;" or if circumstances occurred by which if a man does not give his attention for a few minutes to a person in great peril of life—all these circumstances, it is suggested, are to have no weight whatever—the owner of the cattle has, appa-

rently, a right to the instant attention of the drovers, to neglect everything else, every other duty, even a public duty which they may be called on to perform, and clear his field of the cattle, from which he might entirely have excluded them if he had taken the ordinary means people do of fencing their land from the public highway. I think the owner of land adjoining a highway, upon whose property cattle have strayed, has a right to have the cattle removed within a reasonable time, with reference to all the circumstances that may belong to the transaction at the time of its occurrence, that he has no other or greater right than that, and inasmuch as cattle upon the highway require to be directed and care to be taken with reference both to the public and with reference to the cattle themselves, and especially during the night—it appears to me that if, for instance, the cattle can be taken to a place of safety within a few minutes, and then the drovers may return and with perfect safety to all the cattle, drive off those which have strayed, I think that is a circumstance that may fairly be presented to the jury. If the cattle cannot be put in a place of safety for many hours, it may be a matter to be submitted to the jury to say that they ought then to have run the risk, and to have removed the cattle more immediately. It appears to me that the jury, with all the circumstances before them, have had the question put to them whether the cattle have been removed within a reasonable time with reference to the circumstances of the particular case. I think, therefore, the direction was wrong, and that the rule for a new trial ought to be made absolute. My brother Channell is of the same opinion.—*Rule absolute for a new trial.*

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*In the Court of Queen's Bench, February* 1859.

THE LONDON AND NORTH-WESTERN RAILWAY *vs.* GLYN.

The plaintiffs, common carriers, effected an insurance against fire with defendant; one of the conditions of the policy was, that "goods held in trust or on commission are to be insured as such, otherwise the policy will not extend to cover such property." £15,000 was declared to be insured on "goods, their (the plaintiffs) own, and in trust as carriers," on certain premises therein

named, and the insurers were "liable to pay, reinstate, or make good, at their option, to the said assured, all damage or loss which the said assured shall suffer by fire on the property herein particularized, not exceeding on each item the sum hereinbefore declared to be insured:"

*Held*, that the policy extended to cover the whole value of any goods sent to plaintiffs to be carried, and not merely the plaintiffs' interest as carriers:

*Held*, further, that plaintiffs could recover the value of a package of silk destroyed on the said premises, by fire, although it had not been declared as required by the Carriers' Act, and therefore they would not be liable as carriers for its loss.

Declaration by the plaintiffs against the defendant, as treasurer of the Globe Insurance Company, on a policy of insurance against loss and damage by fire, dated the 11th December 1854, by which the sum of £15,000 was insured on goods (the plaintiffs' own) and in trust as carriers in a certain warehouse, which had been burnt and destroyed by fire, whereby the plaintiffs sustained a loss on the said goods, which they held in trust as carriers, to the amount of £15,000.

Plea (*inter alia*,) that the plaintiffs did not, by reason of the said burning and destroying by fire, suffer damage or loss upon the said goods.

At the trial before Willes, J., at the Surrey summer assizes 1858, a verdict was entered for the plaintiffs for the amount claimed, subject to the opinion of the court on the following case:—

By the policy of insurance upon which this action is brought, an insurance was on the 11th December 1854, effected by the plaintiffs with the Globe Insurance Company for the sum of £25,000, £10,000 of which was declared to be on a warehouse belonging to the plaintiffs, occupied by Messrs. Pickford, situate at the Camden Town station of the London and Northwestern Railway, and £15,000 "on goods, their (the plaintiffs') own, and in trust as carriers therein." And it was declared that during the continuance of the policy "the capital stock or fund of the Insurance Company shall be subject and liable to pay, reinstate, or make good, at their option, to the said assured, all damage or loss which the said assured shall suffer by fire, on the property herein particularized, not exceeding on each item the sum hereinbefore declared

to be insured;" with a proviso that the policy should be subject to the conditions at the back thereof. By the second of the conditions so endorsed, it was provided, "Goods held in trust or on commission are to be insured as such, otherwise the policy will not extend to cover such property." And by the twelfth condition, "In every case of loss, duly proved, the Insurance Company will reinstate the property, or the assured shall receive satisfaction to the amount thereof, without discount or deduction." The policy being still in force on the 9th June 1857, the warehouse and nearly all the goods then contained in it were consumed and wholly destroyed by fire. All claims upon the policy have been settled and adjusted, except those in respect of the £15,000 insured on goods their own and in trust as carriers, in the warehouse as above mentioned. At the time of the happening of the fire the warehouse contained a large quantity of goods, which for the purposes of this case are to be taken to be goods of the plaintiffs in trust as carriers, within the meaning of the policy. These goods were wholly destroyed by the fire. The plaintiffs seek to recover, in this action, the value of the last mentioned goods. It has been agreed that the rights and liabilities of the plaintiffs and the Globe Insurance Company shall be raised and determined upon selected items of the said goods, and that the claims of the plaintiffs against the Globe Insurance Company in respect of the rest of the said goods shall be adjusted out of court, on the principles which may be applied by the court to the said items.

The plaintiffs were from a time prior to 1847, and have ever since continued to be, common carriers of goods by railway, and as such have during all that time carried goods over the London and Northwestern Railway, among other places, from London to Edinburgh. The Camden Town station mentioned above is the terminal goods station of the plaintiffs in London. On the 9th June 1857, a package of silk of the value of £10, and upwards, was received in London by Messrs. Pickford and Co., as agents for the plaintiffs, to be carried by the plaintiffs from London to Edinburgh. These silks were contained in one package, and the value and nature of such silks were not at the time of the delivery thereof to Messrs. Pick-

ford & Co., declared by the person sending or delivering the same, nor was any increased charge or agreement to pay the same accepted by the person receiving such package. This parcel was deposited by Messrs. Pickford & Co. in the warehouse, preparatory to its being dispatched to its destination, and remained there until it was burnt and destroyed by the fire. Messrs. Pickford & Co., after the fire and before this action, with the authority and on behalf of the plaintiffs, paid to the consignee of the silks, part of the value thereof, which was accepted by the latter in discharge of his claim against the plaintiffs in respect of the said silks. The pleadings and policy were to form part of the case.

The question for the opinion of the court was whether, having regard to the provisions of the Carriers Act, 1 Will. 4, c. 68, the plaintiffs were entiled to recover the value of the silks, or the amount so paid in respect of them as aforesaid. If the court should be of opinion that the plaintiffs were entitled to recover in respect of the selected items, the verdict for the plaintiffs was to stand, subject to the adjustment before mentioned, in accordance with the principles laid down by the court.

*Archibald* for the plaintiffs.—The only question with which it will be necessary to trouble the court is, whether there is any defence to this action by reason of the provisions of the Carriers Act. The defendants assert that inasmuch as the goods were not "declared," and the plaintiffs therefore are not liable for their loss, the plaintiffs have not sustained any loss beyond any pecuniary interest they might have in the goods, and that they are not entitled to recover against defendants beyond that amount. The nature of the contract of insurance was decided in the case of *Waters* vs. *The Monarch Insurance Company*, 5 E. & B. 870. There the policy was very similar in its terms to the present one, and that case may be taken as conclusive. Lord Campbell, C. J., in his judgment in that case says: "I cannot doubt the policy was intended to protect such goods. . . I think a person entrustd with goods can insure them without orders from the insurer, and even without informing him that there is such a policy. It would be most inconvenient if a wharfinger could not, at his own cost, keep

up a floating policy for the benefit of all who may become his customers. The last point is, to what extent does the policy protect those goods? The defendant says, only the plaintiffs' personal interest. But the policies are in terms to make good all such damage and loss as may happen by fire to the property hereinbefore mentioned. That is a valid contract, and as the property is wholly destroyed, the value of the whole must be made good; not merely the particular interest of the plaintiffs. They will be entitled to apply so much as to cover their own interest, and will be trustees for the owners as to the rest." And Crompton, J., said: "The parties meant to insure those goods with which the plaintiffs were entrusted, and in every part of which they had an interest, both in respect of their lien and of their responsibility to their bailors. What the surplus, after satisfying their own claim, might be, could only be ascertained after the loss, when the amount of their lien at that time was determined; but they were persons interested in every part of the goods." [ERLE, J.—I quite concur, but nothing is there said about the plaintiffs' ability to recover from their owners. WIGHTMAN, J.—I don't think that decision was limited; I think it extended to all the goods. CROMPTON, J.—I always thought that carriers, warehousemen, and others, had floating policies to insure all the goods passing through their hands; why should the parties sending, and the carriers, both insure? The judgment referred to goes to the extent of the insurer's ability to recover for the whole lien and property of persons entrusting property to them. WIGHTMAN, J.—You may take it that this insurance is perfectly legal.] Then the only question is the extent of the insurance, and that is clearly to the whole value of the goods; the object is to insure the full amount for the benefit of the persons to whom the goods belong. The plaintiffs would be liable both in equity and common law to the owners for the balance recovered. *Sideways* vs. *Todd*, 2 Stark. 400. [ERLE, J.—There is a case of doubtful authority on the point (*Allen* vs. *Impett*, 8 Taunt. 263,) which was in fact overruled by *Roper* vs. *Holland*, 3 A. & E. 99, which settled the point; where there is a promise to pay, an action will lie, but a mere equitable claim is not sufficient.]

*H. Lloyd*, contra.—The plaintiffs insured their own risk as carriers only, and can recover nothing further; the insurance was intended to cover their own loss, and not that of others. The plaintiffs were not bound to pay anything to the owners of the silk; they had a good defence under the Carriers Act, and therefore, personally, they need not have suffered loss. The first question is, who are the assured? and, secondly, what loss, if any, have they sustained? If the assured are the railway company for themselves, and not beyond that as trustees for others, the damage is the liability incurred, and not the sum voluntarily paid by them. *Waters* vs. *The Monarch Insurance Company* is distinguishable from this case; the terms of the two policies are not the same, and Lord Campbell, in his judgment in that case, particularly relies on the terms of the insurance. A special interest may be insured by general words, and yet the insured be entitled to recover only to the amount of his special interest. Arnould on Insurance, 305, 306; *Irving* vs. *Richardson*, 2 B. & Ad. 193; *Wolff* vs. *Horncastle*, 1 Bos. & Pul. 316; *Crowley* vs. *Cohen*, 3 B. & Ad. 478. [CROMPTON, J.—That last case is against you; it shows that a carrier's interest in goods may be insured under the general words "goods and merchandise," and that the insertion of the words "as trustees" is unnecessary.] The words here are not "as trustees," but "in trust as carriers," which words were inserted to comply with the second condition, which requires that the interest assured shall be shown, but not to extend it for the benefit of the owners of the trust property. [CROMPTON, J.—Your argument would be, that there was no necessity to introduce special conditions as to goods held as trustees or as carriers, because a common policy would cover loss to them.] A trustee may insure the property of his *cestui que trust*, but why should the plaintiffs insure any interest but their own? [CROMPTON, J.—To induce parties to entrust them with property, knowing that it was insured.] That may be so with warehousemen and wharfingers, but there is a distinction between those trades and that of a carrier: these latter are generally by law insurers themselves. The question turns upon the policy, which must be regarded in connection with the surrounding circum-

stances, which differ materially from those of *Waters* vs. *The Monarch Insurance Company*. The plaintiffs only meant to insure their own interest; "in trust" is a mere description of property, and not the extent of the interest insured. Why should a carrier have an intention of protecting the property of those who are treating him unfairly, and defrauding him by not declaring the value of the goods sent, and by thus avoiding the payment of extra carriage? [HILL, J.—But are the plaintiffs so defrauded? This is a sort of floating policy, and it is an inducement to persons to send their goods because they know they are insured.] Then it is a temptation to the senders not to declare their more valuable goods. [CROMPTON, J.—I see no fraud. We must look at the policy, and it seems to me to protect the plaintiffs *quâ* trustees.] *Carruthers* vs. *Sheddon*, 6 Taunt. 15, was also cited.

WIGHTMAN, J.—The question raised in this case is, whether the insured are entitled on this policy to recover compensation for more than their own particular interest in these goods; in other words, whether they are entitled to recover for their own particular interest only in the goods, or for the whole value of the goods, including those they held in trust as carriers. I think, according to the terms of this policy, they were insured to the amount of the full value, and that the insurance was not confined to their own interest. The terms of the policy are not ambiguous; the insurance is stated to be upon goods belonging to the Company, and other goods in the warerooms held by them in trust as carriers; and by the second condition it was necessary for the insured to declare what goods they so held in trust for others, and if they neglected to do so, as to such goods the insurance would be void, intending, as it seems to me, to include all property held in trust, as in the case of *Waters* vs. *The Monarch Life Office*, where it was held that persons in the capacity of warehousemen could recover on a policy of this nature, and that they held the amount so recovered, subject to their own charges, in trust for the owners of the goods. It is a voluntary trust, binding on them in a court of equity; if that were not so there might be several insurances on the same goods: that is to say, first, they might be insured by the owner, then by the carrier, and afterwards by the warehouseman.

Now was it not really the meaning of the parties that the insurance should be on the goods generally, leaving the assured to make the adjustment amongst the several claimants? The fact of the plaintiff not being liable to the parties whose goods he held, is not material, as it seems to me that that question also arose in *Waters* vs. *The Monarch Life and Fire Insurance Company*, and the court decided that nevertheless the plaintiff was entitled to recover. That case seems to me undistinguishable from the present, and it seems to me the plaintiff is entitled to insure every interest, although he would not be liable to the owners in case of loss by fire.

ERLE, J.—On the construction of the policy I agree with the rest of the court, and on the terms of that policy I think our judgment should be grounded. I should have been inclined to think that the carrier intended to insure his own interest, but as he is liable for loss or damage by fire, as trustee, he insures for the full amount of value. Then as to the defence that plaintiff and the defendants contracted that the defendants should be at liberty to set up any special defence that might arise, it is doubtful whether they could set up such a special defence, but the case finds that the carriers have paid the senders a part of the value of the goods. If the company mean to limit their liability they must do it by more distinct words.

CROMPTON, J.—I also think that the plaintiffs are entitled to recover to the extent of the full value insured. The plaintiffs insured as trustees, and the loss is loss of trust property. The plaintiffs have an insurable interest, but they are bound to pay over the money received to the owners of the goods, after paying themselves for their own loss. That was so decided in *Waters* vs. *The Monarch Company*. On the construction of this policy I quite agree with my brother Erle; and if the defendants meant to insure on certain specific terms, they ought to have introduced those terms into the policy; but, as they have not, we must hold that the insurance was general, because the condition is, that the policy will not extend to goods held in trust if they are not declared; but here the plaintiffs have declared part of the goods to be held in trust by them as carriers, and for those goods they are entitled to recover; after